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No. 570

IN THE

SUPREME COURT

OF THE

United States

October Term, 1951

TOMOYA KAWAKITA,
Petitioner,
vs.
UNITED STATES OF AMERICA.

PETITION FOR REHEARING

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TOMOYA KAWAKITA,	*Petitioner,*	No. 570
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PETITION FOR REHEARING

To the Honorable Chief Justice Fred M. Vinson and to the Honorable Associate Justices of the Supreme Court of the United States.

Your Petitioner TOMOYA KAWAKITA respectfully petitions for rehearing from the judgment rendered June 2, 1952 by a divided Court affirming the judgment and sentence of death allegedly for Treason.

As grounds for rehearing, we respectfully set forth as follows:

I.

The Majority Opinion of the Court without saying so, reverses the previous decisions of the Court in

Savorgnan v. United States, 338 U. S. 491, and MacKenzie v. Hare, 239 U. S. 299, and the appellant should have an opportunity to discuss and argue the law before the previous decisions are overruled with finality.

II.

The Decision of the Court failed to consider and pass upon the question as to whether Petitioner was only an American citizen when he had his name entered in the Koseki in 1943. It erroneously assumes Petitioner at the time charged in the indictment was a DUAL citizen.

III.

Petitioner was expatriated under Title 8 U. S. C. 801(d) because Petitioner was employed under the Government of Japan; but if his employment was private employment, and in a private company, then those against whom the acts were directed were also engaged in private employment and there could be NO treason. The Court failed to pass upon the international aspect of the case, namely, the status of prisoners of war under international law. The prisoners of war were also working for a private company, receiving private pay as provided by international law. Therefore there could be no treason.

IV.

The Court has now overruled the Mandate of Congress in Title 8, Section 800, and has decided contrary to the express Mandate of Congress regarding expatriation.

V. (A)

The Court has erroneously ruled "without actually resolving the question" that the instruction to the jury regarding Title 8, Section 801 being the exclusive ways of losing American nationality was a HARMLESS error. The "unresolved question" and resulting error involved the very heart of this case. Had the jury been correctly instructed on this subject it would have acquitted the Defendant. The granting of certiorari in Mandoli v. Acheson on a point which vitally affects us also should cause the Court to grant us a rehearing, especially where the Solicitor-General and two courts are in disagreement, and the question is still unresolved. This Court has always been willing to reconsider an important question of constitutional law where it has heretofore not been decided by a majority of the entire Court and has been determined by a divided Court.

VI.

The Court failed to rule on two important questions of law raised by the appeal; namely, the lengthy deliberation of the jury; its request to be discharged after four days and after six days of deliberation, and the Court's refusal to do so, and the error in giving the so-called Allen Instruction under the circumstances after six days of deliberation and in that state of the case. Appellant is entitled to have this Court specifically rule on these questions. The Court of Appeals could not reverse the previous decision of the Supreme Court on this subject. Only this Court could do so.

VII.

The Court failed to rule on the error in the exclusion of the deposition of the Mayor of Suzuka City as to the effect of the Koseki.

VIII.

The Court has erroneously interpreted the Constitutional definition of "Treason". That definition does not define "Allegiance". Other errors of law were made by the Court in its Opinion.

IX.

The Court erred in statements of fact and assumptions of fact on the question of whether the acts in fact constituted question of Treason.

XII.

Because Justice Frankfurter was ill and did not participate, Petitioner should have the benefit of his participation in a rehearing of the cause, and the Court should have the benefit of his views on the various important questions raised in this capital case.

ARGUMENT

I.

THE MAJORITY OPINION OF THE COURT WITHOUT SAYING SO REVERSES THE PREVIOUS DECISIONS OF THE COURT IN SAVORGNAN v. UNITED STATES, 338 U. S. 491, AND MACKENZIE v. HARE, 239, U. S. 299, AND THE APPELLANT SHOULD HAVE AN OPPORTUNITY TO DISCUSS AND ARGUE THE LAW BEFORE THE PREVIOUS DECISIONS ARE OVERRULED WITH FINALITY.

The court has now, without saying so, in its opinion, reversed its decision in *Savorgnan v. United States,* No. 48, Oct. Term, 1949 and *MacKenzie v. Hare,* 239 U. S. 299. It has held in this case that the subjective intent of the petitioner, if he had such a subjective intent, to remain a citizen of the United States still kept him a citizen of the United States even though he performed every conceivable act known to him to divest himself of American Citizenship prior to and at the time alleged in the indictment.

The opinion thus makes one law for Italian-Americans and another for Japanese-Americans—and thus makes one law for Italians and another for Japanese. It makes fish of one and fowl of the other.

The court concedes that it is undisputed in the record that the petitioner did every conceivable act he could to divest himself of American citizenship in the circumstances of the case.

We believe that the Learned Justice who wrote the opinion and his associates on the majority opinion overlooked a very important factual situation because of which the court should grant a rehearing and on which the cause should be reversed. This fact is: On March 2nd or March 3rd, 1943 (R. 4051) Kawakita, while still registered as an enemy alien and only as an American, having reached his majority was not in a Japanese uniform. He was stopped on the street by a Japanese Police Officer who wanted to know about his military status. In Japan citizenship and alienage was then being handled by the police department. At the police station all records were kept of *foreigners* and their change in status from aliens to Japanese citizenship was entered on the police record. Kawakita told the policeman he was born in the United States and was registered as a foreigner. The officer then gave him a choice or *election*—as to whether he was going to remain an American or *renounce* his American citizenship. He asked the officer how he could *elect* to be Japanese and thus *renounce* his American Citizenship. The officer told him the way to do that was to have his name entered on the Family Koseki or Register.

This he did. The next day he made his *election*. He went to the City Hall of the City of Suzuka, where he made a formal declaration of Japanese citizenship. He put his stamp and family seal upon the official family register, entering his name as a Japanese subject. (R. 4385.) He then returned to the police station to remove his name as an alien. The police station was the place

where registration was formally entered regarding one's allegiance. There was nothing ambiguous about this. Japan construed this as an *election* to *abandon* his American citizenship. By reason of this election he was enabled to enter and work in a military area from which all foreigners were excluded, except guarded prisoners of war.

The police records show (Exhibit No. CR) that the police station where the records of renounciation of foreign citizenship was entered that Kawakita had "*recovery of Japanese Citizenship in 1943*". This was tantamount to Japanese naturalization under Section 801 of the Nationality Act. Such physical record establishes the fact therein set out. It is uncontradicted. Thus the physical and uncontradicted evidence supports in every way the testimony of the petitioner that he had elected Japanese nationality and had renounced and abandoned American nationality. Another Exhibit (Exhibit BF of the President of the Meiji University) is to the effect that Kawakita was then in attendance at the University, not having graduated until October 30, 1943. That when he entered the University his nationality was of the United States of America; that while at the University "he *transferred* his nationality to that of Japanese, giving his home domicile at Miye Prefecture on May 20th, 1943."

After the Americans left, Kawakita obtained a job in Japan and continued working there for several months. In December of 1945, he went to the American

Consulate and his testimony at that time that
not claim American citizenship is undenied or
puted by the Government or the Consulate. In I
ber of 1945, the defendant asked the Clerk at the
ican Consulate if he could *reinstate* his America
zenship or not. (R. 4156.) He did not *claim* he
American; he claimed *solely* that he was Japanes
informed the consulate that he had his name e
in the Family Koseki. It was the Clerk at the
can Consulate who informed him that he did no
to do anything about reinstating his American c
ship that he was "a dual-citizen".[1] A few months
the same Consulate told Meiji Fujisawa that
entered his name in the Koseki, he, Fujisawa, h
his American citizenship.

It was the clerk at the American Consulat
typed up the affidavits, and the facts on the affi
which he signed were based upon her informatio
her statement. (See Exhibits 2(A) to 2(I) inclu
It was not Kawakita who claimed he had not ex
ated himself; it was merely the Consulate Of
which he reported and the Army to which he rep

**By the same token as it (the Consulate) foun
Kawakita had not expatriated himself, they also
that he had not committed Treason, for it said "
opinion of this office, he has not actively collab
with the enemy, nor engaged in activities inim
the best interest of the United States beyond the**

[1]Thus "Treason" and a death sentence rests upon the slender re
opinion of someone in the American Consulate that he is a dual citizen
not lost his American citizenship and did not have to reinstate it.

mum necessary to earn a livelihood. A check of the records of the U. S. Army, C.I.C. in Japan reveals no adverse information concerning him." (R. 4174; Exhibit 2F). Therefore, if the finding of the Consulate is binding in one instance it ought to be binding in the other.

The petitioner had done everything that he could in Japan to expatriate himself by word, act and deed. He had made his *election* pursuant to the office which dealt with immigration, namely; the police in Japan, to expatriate himself.

We respectfully ask the Learned Justice who wrote the majority opinion and the Court: WHAT MORE COULD KAWAKITA HAVE DONE IN JAPAN TO HAVE REMOVED ANY "AMBIGUITY" IN HIS ACTIONS OR CONDUCT? WHAT COULD HE HAVE SAID TO ANYONE MORE THAN HE DID? WHAT ELSE COULD HE HAVE DONE TO HAVE LOST AND ABANDONED HIS AMERICAN CITIZENSHIP?

All of his acts or conduct for abandonment of American citizenship were performed long before the period alleged in the indictment, to-wit: August 1944 to August 1945.

He entered his name in the Family Koseki at the instance of and a demand by the Japanese department handling citizenship that he *elect* which citizenship he chose, in March of 1943.[2], He changed his residence

[2]In our country during the war Japanese were required to declare which citizenship they elected. If they chose Japanese citizenship they lost their Ameri-

from the United States to Japan, in March 1943. If he examined the Government Code of the State of California, from which state he came, he would find that *change of residence* resulted in a loss of citizenship, and that allegiance may be renounced by a change of residence. (See § 272 and § 271 Govt. Code of Calif.)[3] He entered into work not merely in defense plant of a private corporation, but he entered into work connected with and directly under the Japanese Army. Only three persons had this type of work and all were closely connected with the Japanese army as to be deemed a part of it.

Our own Army Regulations and Statutes provide that persons serving with the army, even as civilians, are a part of the Armed Forces and are subject to court martial. Here Kawakita was with the Armed Forces of Japan. He had to salute the military officers upon entering the prison and upon leaving it, and had to take orders and commands from them, and he was subject to be severely punished, and even killed, in the event he disobeyed. (R. 208; R. 4105, 11.) It would only require this Court to hold that an American taking a position in a foreign country directly connected

[3]Section 271 Government Code of California says: "Allegiance is the obligation of fidelity and obedience which every citizen owes the state." Section 272: "Allegiance may be renounced by a change of residence." The Constitution of the United States does not define *allegiance* nor makes acts inimical to a citizen's duty of allegiance an ingredient to "treason," nor is there any provision stating when one's duty of allegiance ceases—as, for instance when one's country cannot or dare not extend its protection or aid, *Luria v. U. S.*, 231 U. S. 10; when one is a prisoner of war, *In re Territo*, 156 F. (2) 142; when one has a duty of allegiance to a hostile power in time of war, *Johnson v. Eisentrager*, 339 U. S. 768; or when one has changed his residence, *Cal. Govt. Code*, Sec. 272.

with its Military Operations expatriates himself. This is a different thing than declaring a dual American citizen who accepts any employment merely in some private capacity from a company loses his American citizenship.[4]

The trouble is that where Section 801 of Title 8 of the Nationality Code is a civil statute to the extent that it fails to define clearly the exact type of thing that expatriates a citizen in petitioner's status is to that extent "ambiguous". It is not the petitioner's conduct that was at all ambiguous as to his clear expatriation, or his determination to do so. We can think of nothing more he could have done to expatriate himself, or demonstrate his intent so to do.

Thus the court has now said that the subjective intent of Kawakita to "retain his American citizenship (as evidenced only by his efforts to and his return to the United States after the war) entitles the government to try him for "Treason" even though he clearly expressed an *election* to be Japanese and renounced his allegiance by a change of residence and had entered his name in the Koseki as a Japanese citizen, and duly swore allegiance to the Emperor—which testimony is uncontradicted in the record. We thus have the distinction between Kawakita, whose subjective intent now is made the basis for sustaining the judgment of death, as against the subjective intent of Rose Savorg-

[4]In any event Kawakita's life should not be taken to spare the American citizenship of other Nisei by judicial decision. That is a problem for Congress, not this court.

nan who lost her American citizenship even though she had a secret intent, as she expressed it, to retain it. In the Savorgnan case, her conduct was held to prevail as against her secretly expressed intent as a matter of law. In this case the court says that the intent, which it bases solely upon the affidavit written up by a Clerk in the Consulate and the opinion of the American Consulate in Japan in 1946, prevails over his expressed election and expressed action as shown in 1943, and thereafter in 1944-1945, the period of the indictment. And, as expressed in the earlier case of *MacKenzie v. Hare,* 239 U. S. 299, as binding on Americans, and both of which have now been reversed by this Court without saying so expressly in the opinion.

In *Mackenzie v. Hare,* 239 U. S. 299, the Court had before it a case of an American woman who had married Gordon Mackenzie, a subject of Great Britain. He had resided in California prior to that time and at the time of the case still resided there, and it was his intention to make California his permanent residence. He had not become naturalized as a citizen of the United States. Under a statute of March 2, 1907, 34 Stat. 1228, Congress provided:

> "That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marriage she may resume her American citizenship if abroad, by registration as an American citizen within one year with a Consul of the United States, or by returning to reside in the United States, or, if resid-

ing in the United States, at the termination of the marital relation, by continuing to reside therein."

The Court held that her mere marriage constituted expatriation, although she was still residing in the United States and continued to reside there and intended to do so. The Court upheld the divesting of her citizenship upon mere marriage. The marriage of an American woman with a foreigner has consequences of like kind, may involve national consequences of like kind, as her physical expatriation may involve. Therefore, as long as the relation exists it is made tantamount to expatriation.

Equally with the effect of a marriage is the effect of formally entering one's name in the family Koseki. It is interesting to note that in the statute which Congress passed it provided that registration of an American citizen with a Consul of the United States upon the termination of the marital relationship restores such woman her American citizenship."

The administrative construction by Japan upon the koseki is similar. The failure to have petitioner's name in the koseki required of him that he report to the police station as an alien, and have his name entered in the alien register. When his name was entered in the koseki the official police records set forth that his Japanese citizenship was restored. When he went to the American Consul on June 13, 1940, in connection with his application for renewal of his passport, he informed

the Consulate that he did not possess Japanese nationality. The Consulate made a finding that "This is *not* borne out by the certified copy of his family census register, which shows *no record of his renunciation of Japanese nationality* as required by law. Signed: W. Garland Richardson, American Vice Consul." (Exhibit 2-B.) A similar finding was made by Charles H. Stephan, American Vice Consul, on April 7, 1941. (Exhibit 2-D.) **It is thus apparent that Japanese nationality is established or renounced by the family register or koseki. Kawakita therefore cannot escape the consequences of his voluntary act of expatriation in having his name entered in the family koseki, which thereafter removed him in the eyes of the Japanese from being an American, and imposed upon him all the rights and duties of a Japanese citizen or subject as we shall hereinafter set forth in detail.** Expatriation is evidenced by emigration, coupled with other acts indicating the intention to transfer one's allegiance. This has been the doctrine ever since *Mackenzie v. Hare.* The doctrine there announced was reaffirmed by this Court in an opinion by Mr. Justice Burton in which he stated that "The Court held that, during her coverture, her expatriation was binding upon her as the statutory consequences of her marriage to a foreigner in spite of her contrary intent and understanding as to her American citizenship. She accordingly was denied relief." *Savorgnan v. United States,* 338 U. S. 491, 502.

Whatever the petitioner herein may have intended to the contrary, or whatever understanding he might

have had with reference to his American citizenship, became as of naught, for he was bound by the voluntary act and step which he took after conferring with his uncle and then going to the registrar's office in the City Hall, and making his formal election. As in the *Savorgnan* case, so here the petitioner was then a competent adult. He had gone to a University. He was an interpreter, understanding both Japanese and English. He voluntarily and knowingly sought and obtained Japanese nationality. In the *Savorgnan* case her application for naturalization and her oath were in Italian which she did not understand, but in the instant case the petitioner understood Japanese and was an interpreter and fully understood the meaning of his voluntary act. He knew when he put his seal upon the document he was taking an official and formal step to acknowledge his Japanese allegiance.

He thereafter received certified copies of the document, and took them, one to the police station which handled all immigration and naturalization matters in Japan, where again that Department removed his name from the alien register upon a showing by the petitioner through his koseki that he had formally reaffirmed his allegiance to Japan, (Exhibit A, Deposition of the Attorney General of Japan) and that Department struck his name from the register of aliens. He went to work where he had to show his koseki. As stated in *Savorgnan v. United States,* he is bound by the legal consequences of those acts. In this regard, the facts are undisputed and uncontradicted and sub-

stantially corroborated by written documents and the Government's own witnesses. There is no dispute that petitioner's name was not in the family register when he went to Japan. There is no dispute that he was registered as an alien at the police station. There is no dispute that on March 8, 1943, he went with his uncle to the office of the Registrar of the family census at the City Hall and had his name entered. There is no dispute under the deposition of the Attorney General of Japan that only Japanese citizens could enter their names in the koseki, and foreigners could not. There is no dispute that after his reaffirmation of allegiance to Japan he was allowed to go about Japan wherever he wished and was even given a Japanese passport to go to China, and that he was thereafter subject to all rights and duties of a Japanese citizen which had not been imposed on him before. The deposition of the Attorney General of Japan is uncontradicted, (as of course it could not be). As long as the matter was not in conflict it became purely one of law. *Gallegos v. Nebraska*, 342 U. S. 61; *Kansas City Southern R. Co. v. Albers Comm'n Co.*, 223 U. S. 573; *Norris v. Alabama*, 294 U. S. 587; *Watts v. Indiana*, 338 U. S. 49. As such, this Court should find under the doctrine of the *Savorgnan* case that the petitioner is bound by the legal consequences of those acts, that he lost his American citizenship as of March 8, 1943, and that no subjective intent, if he had it, could preserve for him a duality of citizenship.

It may be pointed out that immigration matters were handled by the police and that the Japanese had the greatest respect for police authority. The records which we secured in regard to Kawakita's alien standing were secured from the police station. Hence what better authority could petitioner have than inquire from the police what to do in the situation he was in? The policeman's advice was sound and correct for upon the entry of the petitioner's name in the family koseki the entry at the police station shows that his Japanese citizenship was restored. He no longer had to have a permit to travel anywhere, and he was able to get a Japanese job in a restricted military area where his employers believed they could only hire Japanese citizens.

The Government has stipulated in this case, and the Court instructed the jury, that at all times mentioned in the indictment the petitioner had Japanese citizenship, but it was not recognized either by himself or by the Japanese until his name was entered in the family koseki. "Citizenship" says this Court, "is membership in a political society, and implies a duty of allegiance on the part of the member, and the duty of protection on the part of the society. These are reciprocal obligations, one being the compensation for the other." *Luria v. United States*, 231 U. S. 10, 22. But during the war this Government could give him no such protection. Japan gave it to him, and demanded and received his loyal allegiance.

As further said in that case, "These requirements (of citizenship) plainly contemplated that the applicant, if admitted, should be a citizen in fact as well as in name—that he should assume and bear the obligations and duties of that status as well as enjoy its rights and privileges." Since the uncontradicted testimony in this case shows that the petitioner lost his citizenship by electing Japanese citizenship and loyalty, by entering his name in the family koseki, and performing duties in respect to that loyalty, his clandestine belief (if he had one), under the doctrine of the *Savorgnan* case, meant nothing, and the matter was purely one of law in this state on the evidence to determine that he had lost his American citizenship.[5]

This Court, in *Savorgnan v. United States,* decided the facts for itself as a matter of law, regardless of the findings below, and there is no dispute in the instant case as to the petitioner's intent to elect Japanese citizenship and to prefer his allegiance to Japan at the time of the entry into the koseki and thereby abandon American citizenship. In the *Savorgnan* case, even though there was a question of fact regarding her intent because she lived in this country, and she took the oath without intending to establish a permanent residence other than the United States, and when she went to Italy she did not intend to establish her residence there, or abandon her residence in the United States, this Court found even though she had such

[5]With due respect to the learned judge, the *Savorgnan* case had not then been decided.

subjective intent it was immaterial and found that she had lost her citizenship as a matter of law. In the instant case all of the evidence is uncontradicted even as to the petitioner's intent. Therefore, this Court should find as a matter of law, as it did in the *Savorgnan* case, that the petitioner had lost his American citizenship.

We think that we should have a chance to re-argue these questions fully and compare the two cases with the actions of the court in this case before the decision becomes final.

The Attorney General of Japan (Exhibit A) said in his deposition that only Japanese Nationals can be registered in the Family Register and *foreigners cannot be.* Therefore it is clear that Japan regarded the entry of Kawakita's name in the Koseki as an election to renounce or abandon American citizenship. Hence, Kawakita was no longer an American foreigner.

We have held constantly that the construction by a State of its own laws is binding upon the courts of the United States. This has been the declaration of this court ever since *Erie R. R. Co. v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188. If, then, we follow a doctrine that the rule of decision is the rule of the State in which the action or thing takes place, is it not more cogent that a citizen and resident of a foreign country would look to the interpretation in that country of his acts and conduct; and, looking at it from that standpoint, making inquiry from his own officials and viewing the

thing as Japan viewed it, it is clear that the petitioner expatriated himself in the eyes of Japan, and that we should give effect to Japanese interpretation. Otherwise, he could not have had his name removed from the alien register; he would not have been free to go about and to travel on a Japanese passport; he would not have been free to take a position in a defense area directly attached to the army.[6]

We again say that all of these acts, in the eyes of Japan, expatriated the petitioner and made him solely a Japanese subject. It was clearly an *election* to abandon his American citizenship.

We again ask the Learned Justices who participated in the majority opinion how they would have advised the petitioner to have renounced or abandoned his American citizenship by act, word or conduct other than what he did, and in the circumstances that he did

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[6]The interpretation by Japan of Kawakita's status as solely a Japanese subject is binding upon us as a matter of law and the verdict of the jury is contrary to the law and the evidence since the jury found contrary to the undisputed evidence finding of the Japanese government. This was at a time when the shadow of the noose was not hanging over Kawakita's head nor had the smell of lethal gas, used in California, been imminent, nor was there any thought or even remote view that Kawakita had committed a crime against the United States.

The majority decision of this Court has consequences far beyond the individual whom it affects. It means that every dual-American will have to guess at his status and the possible outcome of a war. And, it will be a precedent for other countries where American citizens of dual-nationality are residing; and we will find Americans whom we cannot protect subject to prosecutions for "treason" by reason of the law now established in this decision. The U. S. Supreme Court's decision in this case, if allowed to stand will set the precedent and pattern for a more heartless world unless reversed and may even be a weapon for Communists to use in their propaganda in the Far East. No decision can now be found in international law or its cases where a "dual citizen" has been tried and convicted for acts of patriotism or zeal for one of the countries of which he is a national while living there and while this other country cannot offer him protection or anything else in return for his citizenship. Nor can any decision be found making "treason" any acts in private employment of a private corporation upon prisoners who have acquired a private status under international law. This is an expansive and court-made definition of "treason".

it? At that time there was no American Consulate in Japan where he could have taken any further action. Having been advised by the Department handling Japanese naturalization and aliens that the way he could do it was by entering his name in the Family Koseki and having done so and having returned to the Japanese Police Station, which record documentarily shows that he "recovered" his Japanese nationality, he made an express declaration of his allegiance to Japan and thereafter continued a daily specific pledge of loyalty, fidelity, obedience and service to the Emperor. The Koseki itself shows entry and removal of nationality. It was for this reason that the defendant himself introduced it in evidence after the government failed to introduce it. (See Exhibit AW in evidence.)

This Court has not hesitated to reverse its previous opinion where on reconsideration it has determined that it was wrong, (*Erie R. R. Co. v. Tompkins,* 304 U. S. 644), and even to reverse itself and to reverse a case on second rehearing and order the indictment dismissed. (*Zap v. United States,* 330 U. S. 800.)

We respectfully ask the Court now to grant a rehearing and reverse its previous decision based upon error of fact and law.

If as the court now holds that Kawakita's conduct was ambiguous in so far as his loss of nationality is concerned, three other major errors now appear in the record which were not touched upon by the Court in its opinion and upon which rehearing should be granted:

THE INSTRUCTION re THE EXCLUSIVENESS OF TITLE 8 U. S. § 801 WAS NOT "HARMLESS ERROR".

(1) The Court says that the instruction to the jury that Section 801 is the exclusive way of losing United States nationality may have been erroneous, but that the error was harmless. It does not clearly resolve the question, and a hearing is now pending in Mandoli v. Acheson. We should likewise be heard on this important question.

We respectfully point out that if Kawakita's actions were "ambiguous as to his loss of nationality" such error becomes fundamentally important, especially in view of the fact that the court has now in reversing its previous decisions in *Savorgnan v. United States* and *Mackenzie v. Hure* has held that the question of intent on the part of Kawakita becomes important to be determined.

The jury might equally have viewed that all of the acts and conduct of Kawakita did not specifically come within the terms of Section 801 of the Nationality Act, just as the majority of this court has view those acts, since the language of Section 801 does not define *"an election"* to abandon American citizenship by *word* or *conduct* as one of the ways of abandoning or renouncing American citizenship under 801 of the Nationality Act. (See *Yasui v. United States,* 48 Fed. Supp. 40.) There the court said:

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"The election is a mental act. The choice which exists in the mind of the person is exemplified by acts. The intention, however, to make an election can be discovered by a tribunal, as can criminal intent, knowledge, or any other mental state . . . Such a mental state may be found in a criminal case contrary to the sworn evidence, protestations and declarations of a defendant."

The jury, however, might have believed that the petitioner did not come within the terms of Section 801 of the Nationality Act, which they were informed were the ONLY ways that he could lose his American nationality. This Court itself did not resolve the issue (Footnote in Casey v. U. S., 96 L. Ed. (Adv.) 926-7.) The Solicitor-General disagreed[7] with another circuit; hence there has been and is an unsolved conflict between the circuits which has not been, but should be decided in this case, and which vitally affects the right of appellant. However, we contended and this Court agreed, that there are other ways in which he could lose his American nationality, and, the very acts described here now as "ambiguous" in renouncing American citizenship and which three

[7]The Ninth Circuit Court of Appeals affirmed a treason conviction, one ground of affirmance being that the methods of expatriation listed in the Nationality Act of 1940, 54 Stat. 1168, were exclusive. *Kawakita v. United States*, 190 F. 2d 506, 511-514 (1951). We granted certiorari, 342 U. S. 932, and affirmed the Court of Appeals without resolving the question. 343 U. S. ——. The Solicitor General urged in support of the conviction that the expatriation procedures of the Nalionality Act were exclusive.

In the District of Columbia Circuit, a judgment denying a claim of citizenship was affirmed, one ground of affirmance being that methods of expatriation listed in the Nationality Act of 1940 were not exclusive. *Mandoli v. Acheson*, 193 F. 2d 920, 922 (1952). In his memorandum in response to the *Mandoli* petition for certiorari, the Solicitor General, adhering to his position in *Kawakita*, asserted that this ground of the Court of Appeals decisions in this case is "clearly erroneous." This court has granted certiorari in *Mandoli v. Acheson*. We should also be heard at the same time.

members of this Court now agree did constitute renunciation of American citizenship, might well have been believed by the jury to have had that effect if the jury had been instructed properly that Section 801 was NOT the exclusive way of losing American nationality but that any of the acts such as here contended for would result in the loss of American nationality.

It would have also been highly important to determine the issues because the jury, had it been instructed that Kawakita's intent was immaterial if the acts itself showed that he had had an election, could have acquitted him.

From the acts, the jury had to find, necessarily, that Kawakita's secret and subjective intent to remain an American citizen based upon the Consulate's action and affidavit prepared by the Consulate controlled him rather than that his acts and conduct during the period alleged in the indictment, to-wit from 1944 to 1945, controlled and showed that he had renounced his American citizenship.

THE DEPOSITION OF THE MAYOR OF SUZUKI CITY WAS ERRONEOUSLY AND PREJUDICIALLY EXCLUDED.

(2) The decision as it now stands makes important and significant the errors in excluding the deposition of the Mayor of Suzuki City (Exhibit Co) where Kawakita entered his name in the Family Koseki.

This subject was not touched upon at all in the opinion of the Court. This was a deposition of *Ryuzo Sugimoto* (R. 4384 line 15 to R. 4386 line 14). Kawakita testified as to his acts in going down to the City Hall and formally entering his name in the Family Register. Exhibit CO qualifies the Mayor of Suzuka City as familiar with the Japanese law of the Koseki Tohon, the Family Register. The Mayor testified that the entry in the Family Register becomes an election that the person entering his name wished from that time on to be considered a Japanese national. The court excluded this vital deposition. If there was any ambiguity in the conduct of the petitioner, as the majority of the court now believes, it is certainly cleared up by the deposition which was excluded.

The court of appeals did not pass upon this issue; neither has this court.

THE JURY WAS COERCED

(3) In the light of this Court's Opinion now, with a conflict of four to three in the decision of the Court, it becomes vital that this Court grant a rehearing to consider a matter not touched on in the Opinion of the Court, namely, that the jury was out in deliberation about nine days, and deliberated over a period of eight days.

That the jury was as sharply divided, perhaps, as has been this court on the question of citizenship is shown by the fact that after four days of deliberation it returned into court and asked to be discharged as "hung up". Mr. Sidel said he had been on many juries and that every question had been discussed, "we approached it from every angle. There isn't an angle that I can think of that could be approached that would bring about, as we feel, any positive result or agreement. We agree and not agree, and we just can't get anywhere with the situation and the slang 'hung up', that is what we are up against." The trial judge told the jury that it was their *duty* to agree, and that the minority should listen to the majority to see if it wasn't reasonable to the minds of the minority with a disposition and open-minded—a disposition to be convinced. "If the much larger number of you are for a conviction, each dissenting juror should consider whether a doubt in his or her own mind is a reasonable one, since it makes no effective impression upon the minds of so many equally honest, equally intelligent fellow jurors

who have heard the same evidence, with the same attention and with an equal desire to arrive at the truth and under sanction of the same oath." This is not the American concept of "reasonable doubt" nor the duty and function of jurors on an American jury.

The same argument might well apply to this Court. Then all decisions would be unanimous. The jury had then been out six days and the statement of Juror Sidel is clear that they had disagreed like this court has disagreed on the issue of nationality. It was certainly coercion to continue the jury deliberating three more days, following the giving of this instruction. See *Peterson v. United States,* 213 Fed. 920, at page 924.)

We say, respectfully, if this Court was locked up for six days and then told it would be continued to be locked up, without any period of time and not knowing when it might be discharged unless it agreed, we might have had a unanimous opinion of this court—but it wouldn't have been a just or conscientious one nor according to our American concepts. As said by the Court in *Peterson v. United States*:

> "In any event, it was not its right to demand an agreement; nor did the defendant have such right."

And the court also criticized in that case the trial court's comments as to the question of expenditure and cost for another trial.

We say, most respectfully, that the court had no right to instruct the jury at the time that it did; its

remarks were coercive and prejudicial error, and that we had a right to have this court pass upon this very vital matter in the case, in view of the fact that this Court has now reversed its view of its decision in *Savorgnan v. United States* and *Mackenzie v. Hare* held that the jury has a right to consider the question of intent. Since it has now, contrary to previous decisions, been made a jury question, we respectfully submit that we should have a right to argue and present this very vital and fundamental question not decided by the opinion of the court and not discussed in the course of oral rgument heretofore. This vital question of the jury was presented by the petition for certiorari and we have a right, we believe, to have a decision on this question; since the question involves the overruling of a decision of *this court* in the case of *Allen v. United States*, the court of appeals would necessarily be bound by the decision in the *Allen* case while this court could well overrule it or distinguish it.

In no case have we found a Federal jury being held out for deliberation for a period of *nine* days. In no case have we found a charge to the jury such as in the *Allen* case having been given to the jury after it had reported twice that it was hopelessly deadlocked, and its foreman, familiar with court rules of law and procedure since he was a lawyer, had twice asked that the jury be discharged. In no case have we found, in the Federal courts, where a juror even did not wish to return for further deliberation but was virtually compelled to do so by the order of court, after being given

an instruction asking the jury to come to a unanimous agreement. What has become of our American concept of fair trial?

In no case have we found where jurors became ill without the fact being reported to defense counsel, and of jurors being nervously exhausted and having to call a doctor for nervous exhaustion without the fact being reported to defense counsel.

We respectfully submit petitioner is entitled to *this* Court's answer to the point that the jury was illegally coerced into a verdict and that the preceedings and procedure had were in violation of his rights to fair trial and an uncoerced jury under the Fifth Amendment to the Constitution of the United States.

We had a right to challenge the correctness of the *Allen* decision as it applies to the facts in this case, and to ask the court to hold that such an instruction was and is erroneous in the light of the circumstances and acts in this case. We also had a right to have this court pass upon our request to this court to overrule the Allen decision—a request which could not be granted by the Court of Appeals.

This Court considered the applicability of the *Allen* instruction, 164 U. S. 492, 501, as one of great importance in the administration of criminal justice. But in the *Allen* case the jury was not out four days, nor six days, nor had it twice asked to be discharged; nor had its members been under the care of a physician for nervous exhaustion, as in the present case. This Court

should resolve this fundamental question in its own opinion and by its own consideration.

We think that since this question was raised by the petitioner on his petition to this court and briefed by both the petitioner and respondent that it should be decided by this court. Only questions not raised below and presented by the petition are not decided by this court. (*Olson v. United States,* 292 U. S. 246, 262; 78 L. Ed. 1236, 1248; *Johnson v. Manhattan R. Co.,* 289 U. S. 479, 494, 77 L. Ed. 1333; *Gunning v. Cooley,* 281 U. S. 90, 98, 74 L. Ed. 720, 726.) Questions specifically raised in this court should be decided in this court. *Crown Code & Seal Co. v. Gutmann Co.,* 304 U. S. 159; *Rorich v. Devon Syndicate,* 307 U. S. 299.

II.

THE COURT'S DECISION FAILED TO CONSIDER AND PASS UPON THE QUESTION AS TO WHETHER PETITIONER WAS ONLY AN AMERICAN CITIZEN WHEN HE HAD HIS NAME ENTERED IN THE KOSEKI IN 1943.

Petitioner has previously argued that at the time he caused his name to be entered in the family Koseki he was only an American and not a Japanese citizen.[8]

The complete difference in treatment afforded petitioner before and after the entry, particularly the fact

[8]This is entirely a separate situation from the question as to petitioner being a dual citizen at the time of his birth.

that prior thereto, although of draft age and although all Japanese males of draft age were subject to the draft (R. 4187; Exh. W-1, p. 4), he was not drafted (R. 4052), while after that entry he was, as a Japanese subject, drafted for the labor draft (R. 555, 554, 565, Exh. Z, R. 4354, Exh. DP), makes it imperatfve that this court grant a rehearing and pass upon this far reaching contention of petitioner.

As pointed out by Petitioner in his reply brief, the facts being uncontradicted as to what petitioner did and how he was treated by the Government of Japan, both before and after, it becomes a matter of law as to whether petitiener had *Japanese* citizenship at the time of the Koseki entry. If he did not, and prior thereto he was considered an alien by the *Japanese* Government, but thereafter he was considered a Japanese by that government, it follows that this court must follow the Japanese Government's interpretation and hold that at the time of the Koseki entry, petitioner did not possess Japanese citizenship. His acquiring of it, therefore, must, as a matter of law be considered to come within the expatriating features of 8 U. S. C. 801 (a), and is "tantamount to naturalization in a foreign country". As the court below left it to the jury and instructed the jury that Section 801 was exclusively the method by which one could lose his American citizenship, and this was not one of the ways specified therein, this fact was not considered or determined by the jury below.

Since the court in its opinion did not deal with the question, the argument is set out here again. Re-hearing should be granted for full argument and decision on the point.

When Petitioner was born in 1921, he was, by virtue of Article 1, of the Japanese Nationality Act, (Exh. C 2) a citizen of Japan. In 1924, however, this act was amended and Paragraph 2 was added to Article 20 of the Nationality Act. *(Ibid.)* By virtue of that paragraph, a person who, though born a Japanese citizen by virtue of Article I of the Nationality Act because of the nationality of his parents, does not take steps to *retain* his Japanese nationality, *loses* his Japanese citizenship "*retroactively* from his birth."[9]

The record is clear, of course, that petitioner, nor anyone on his behalf, did nothing toward retaining petitioner's Japanese nationality. According to the Japanese Nationality Law Regulations, the method such a "Japanese citizen" in one of the designated countries uses to "retain" his Japanese citizenship is to have his name registered at the Japanese Embassy or consular office in that country of his birth. In the case of one born *after* the effective date of the 1924 amendment (Dec. 1, 1924), this must be done within two weeks after birth. In the case of one born *before* December 1, 1924, to whom the section applies, it is Petitioner's contention such entry must nevertheless

[9]This applies, of course, as the paragraph indicates only to persons born in certain designated countries and who also have the citizenship of such country by birth. By virtue of Imperial Ordinance No. 262 of November 15, 1924, the United States is one of these countries.

have been made after the effective date of the amendment.

Accordingly, Petitioner, not having "retained" his Japanese citizenship after the passage of the 1924 amendment, he lost such citizenship "retroactively from his birth" and therefore from and after 1924[10] he was only an American citizen and not a Japanese citizen.[11].

This, then explains why Petitioner was not treated as a Japanese by the Japanese government up until the Koseki entry but that thereafter he was. That is to say, prior to that time he was *not* a Japanese citizen, but thereafter he was. Accordingly, the Koseki entry under these particular circumstances, *must* amount to a naturalization within the meaning of 8 USC 801 (a).

Because this argument is so vital to the case and because it was not answered by the Government nor passed upon by the Court, rehearing should be granted

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[10]And retroactively to 1921.

[11]Petitioner is aware that there has been interpretation of the 1924 amendment to the effect that it only applies to those born after December 1, 1924. But petitioner contends that this interpretation is erroneous. The argument in favor of the erroneous interpretation is that Paragraph 2 of Article 20-2 of the Nationality Act provides that a person born in one of the named countries may *expatriate* himself. However, Sections 3 and 4 of the Japanese Nationality Law Regulations provide that to expatriate oneself, one must present the Japanese Embassy or Consulate in the country in which he is living or was born with a certified copy of his *Koseki* and of his birth certificate. This pre-supposes, therefore, that such person *has* his name *already* in the Koseki. But if one does not *already* have his name entered in the Koseki, he simply cannot present such a document to the Embassy or Consulate. Accordingly, the *continued* dual citizenship of those born before December 1, 1924 if at all, can only apply to those born of Japanese parents, in the United States—for our present purposes—, who, prior to that date, had their names entered in the Koseki. This was the situation in most cases. It was *not*, however, the situation in Petitioner's. His parents never did register him with the Japanese Embassy or Consulate, nor had his name been entered in the Koseki.

to afford full opportunity for argument and amplification. Perforce, if this reasoning was overlooked by the Court, and, if cogent—which Petitioner asserts it is, it would be a manifest injustice to allow the present decision of the court to stand. For, if the argument is sound, and no re-hearing is allowed, it would mean that Petitioner will have been convicted of treason though he had expatriated himself from United States citizenship and owed no allegiance to this country.

III.

THE COURT'S REASONING re NO EXPATRIATION UNDER 8 U. S. C. 801 (d) WORKS BOTH WAYS; IF PETITIONER'S WAS PRIVATE EMPLOYMENT, SO WAS THAT OF THE PRISONERS TO WHOM HE INTERPRETED. UNDER INTERNATIONAL LAW THEY WERE DISARMED LABORERS, SWORN TO DO THE WORK REQUIRED. NO TREASON CAN BE FOUND FOR CAUSING ADDITIONAL WORK FOR A PRIVATE EMPLOYER.

In refusing to hold that Petitioner had expatriated himself under 8 USC 801 (d), the Court failed to recognize that the acts alleged to have been committed by Petitioner had to do with his service under the orders and control of the Japanese Army and not with those of a private corporation. The indictment itself recognizes the difference between the military nature of the activity involved and the purely private, commercial

venture of the company. Thus the indictment distinguishes between the prisoner of war camp "maintained by the Japanese Government" and the Nippon Metallurgical Industry Co., Ltd., a corporation "organized and existing under and by virtue of the laws of Japan."

It was for his alleged acts under military supervision and instruction with reference to the prisoner of war camp maintained by the Japanese Government that Petitioner was indicted. Therefore, the concern of the Court for other persons who, in general may have accepted purely private employment is not necessary here.

However, if the nature of Petitioner's employment was solely of a private nature as the Court now says in one breath and had only to do with a private corporation, then, by the same token so also both Kawakita and the prisoners of war were engaged in a purely private venture. The reasoning works both ways. Assuming then, that all that was involved was purely private endeavor, it logically follows that Petitioner cannot be guilty of treason in relation thereto. Surely, working for a private corporation and causing others to turn out more work for a private corporation, under the court's reasoning, or causing the lowering of morale among such persons engaged in endeavor for purely private purposes cannot be treason to the United States. To be made objectively subservient, *arguendo*, even if true, to the U. S. Steel Company, or the Nippon Metallurgical Co. is not treason.

Accordingly, because the Court overlooked, it is respectfully submitted, the governmental nature of petitioner's employment, which lost him his U. S. citizenship, or if it did not, then the Court's reasoning does not logically follow, the rehearing should be granted in order that a proper conclusion be arrived at. For in either event no treason was committed.

IV.

THE MAJORITY OPINION REGARDING THE CONCEPT OF DUAL CITIZENSHIP IS IN CONFLICT WITH THE INSTRUCTION WHICH THE TRIAL COURT GAVE TO THE JURY AND, THEREFORE, THE JURY WAS PREJUDICIALLY INSTRUCTED ERRONEOUSLY AS TO THE LAW.

This Court has said in its opinion:

> "The concept of dual citizenship recognizes that a person may have and exercise rights of nationality in *two* countries and be subject to the responsibilities of both. The mere fact that he asserts the *rights* of one citizenship does not without more mean that he renounces the other."

We take this to assert that a dual citizen owes *allegiance* to two countries at the same time, for, exercising the *rights* of nationality entails the *obligation* of *allegiance*.

This Court further says:

> "As we have said, dual citizenship presupposes *rights* of *citizenship* in each country. It could not exist if the assertion of rights or the assumption of liabilities of one were deemed inconsistent with the maintenance of the other."
>
> Rights of citizenship are necessarily a reciprocal obligation and imply a duty of allegiance, one being a compensation for the other. *Luria v. U. S.*, 231 U. S. 9, 28.

But the *trial* court, in instructing the jury, said:

> "It is legally impossible for any American citizen to owe *conflicting* allegiance to any other country so long as he or she remains a citizen of the United States." (R. 5505-5506.)

Hence, the jury was instructed that although the petitioner was a dual citizen, he could owe allegiance *only* to the United States, whereas if the jury had been instructed as the court now says the law to be, a different result might have been attained.

Furthermore, if the jury had been instructed as the court now says the law could be that "conceivably (entering one's name in the Family Koseki) might have greater consequences. In other settings it might be the *equivalent* of *naturalization* within the meaning of Section 401 (a) of the Act or the making of 'an affirmation or other formal declaration of allegiance' to Japan within the meaning of § 401 (b)."

We revert to a former argument, the *equivalent of naturalization* is not one of the methods set out in Section 401 (a) of the Nationality Act, (Title 8, Section 801). Had the jury been so instructed that Section 801 is not the *exclusive* method of losing one's nationality, a different result might have been reached in this heavily divided, nine day-long kept jury. Had it been told that entering one's name in the family Koseki might be the "equivalent of naturalization" a different result could have followed.

This court now also says that "bowing to the Emperor daily after he entered his name in the Koseki is not an expression of allegiance to Japan and of expatriation ceremony." And, by the same token, it would inferentially hold therefore that one who daily "pledged allegiance to the flag of the United States and to the principles for which it stands, one Nation indivisible, with Liberty and Justice for all" is not an expression of allegiance to the United States.

On page 7 of the slip opinion, this court erroneously stated as a fact:

> "In December, 1945, he applied for registration as an American citizen and in that connection *he made an affidavit,* in which he stated that he had been "temporarily residing in Japan since August 10th, 1939."

An examination of the document shows that he did not make it; that it was prepared by some one else, by the American Consulate on a form and that it was typed

there onto the form, and that he merely signed the document after an officer of the American Government told him this was his legal status. The Government should not be allowed to take advantage of this mistake of law and fact, to the prejudice of appellant. Equitable doctrines of estoppel should apply. *Sorrels v. U. S.*, 287 U. S. 45.

Another vital error of the opinion which we should be permitted to reargue is the fact that the majority decision of this Court now changes a long-period policy of this Government and reverses the expressed policy of Congress in Section 800 of the Nationality Act.

It also reverses principles enunciated by *Cramer v. U. S.*, 325 U. S. 1, by Mr. Justice Jackson.[12] We respectfully say that we do not see how this court could reconcile its opinion in the *Cramer* case with the majority

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[12]In the *Cramer* case Mr. Justice Jackson and the Court stated that the minimum function of the overt act in a treason prosecution is that it show action by the accused which really was aid and comfort to the enemy government. *Cramer v. U. S.*, 325 U. S. 1, 34; 89 L. Ed. 1441, 1460. They had to be acts in furtherance of a design for treason. The same learned Justice said in *Haupt v. U. S.*, 330 U. S. 634. "Cramer's case held that what must be proved by the testimony of two witnesses is a 'sufficient overt act.'" Re-examined in this light how could any of the acts in this case be a sufficient overt act or a "design for treason?" How could they have given assistance or comfort to anyone? Surely our constitutional fathers had no such concept in defining "treason" as a constitutional crime!

All of the alleged acts were committed in connection with prisoners of war, who were a labor battalion within the confines of Japan and were governed by international treaty and therefore subject only to the laws of Japan. Two of the alleged acts constituted minor acts of alleged assault for not performing the required quota of work required by the camp authorities, under International and Japanese law. A third consisted in the failure of returning a person injured while at work to the camp prisoner of war hospital supervised by an American prisoner of war doctor as promptly as he thought he should be returned. The other five acts alleged consisted of aiding the military in punishments for committing the serious offenses of theft of scarcely rationed food products, which deprived other prisoners of war of the like quantity of food products. Discipline to prevent thefts was necessary to protect other American prisoners of war and was of benefit to them. [See Record of Testimony of Capt. C. M. Bleich, American prisoner of war doctor in charge.] How then could such acts be "treason?"

opinion in the present case. This court has magnified alleged petty war crimes in a private defense plant in Japan to the high crime of treason against the Government of the United States. Re-examination of this opinion and comparison with the *Cramer* case and the historical background of treason therein set out shows no *treason* was committed.[13] It should not do so merely to punish the defendant.

[13]When our case was first presented to this Court our client was concerned over the fact that Justice Jackson had been a prosecutor of War Crimes and War Criminals at the Neurenberg Trials. We allayed his concern by assuring him that by reason of this very fact Justice Jackson would easily distinguish the petty acts charged here, to-wit carrying two buckets of paint, running around a compound four times, delaying medical treatment by an American prisoner doctor a matter of two to three hours, etc., as not being those acts of Treason contemplated by the framers of our Constitution, but at the worst the pettiest kind of petty war crimes, and that by reason of those facts Justice Jackson, who had handled war crimes as distinguished from crimes of Treason, would easily distinguish the two and be better qualified. We could not reconcile the decision of *Cramer v. United States*, 325 U. S. 1, and also *Haupt v. United States*, 330 U. S. 645, where help was given to the agents of an organized government in a design on treason, as compared to the petty acts charged here, occurring in a foreign country relating only to disabled prisoners of war who by International Law were given a status of non-combatants or civilians, and by which the foreign government could not and did not benefit.

At the time of oral argument, Mr. Justice Jackson stated that he had not yet read any of the briefs in the case and that he was reading the Government's brief first because it was shorter. This was unfortunate since it afforded us no opportunity to argue understandingly with the Court and with Justice Jackson that the acts here charged could not in any sense of the word measure up to the Constitutional definition of Treason or to the principles which he set forth in his two outstanding opinions on the law of Treason, to-wit, *Cramer v. United States*, 325 U. S. 1, and *Haupt v. United States*, 330, U. S. 645.

We, therefore, appeal to Mr. Justice Jackson to re-read our briefs (both opening and closing) in the case and to compare the nature of the acts herein with the decision he has written, and to afford us an opportunity to re-argue whether the acts here charged could in any sense of the word constitute Treason as a matter of law or of fact, and whether they are not in conflict with his previously written decisions on the subject, and whether the acts here could or did amount to the high crime of Treason in aid of a foreign government, as defined by him in *Cramer v. United States*. Our inability to argue this subject fully or intelligently, both by reason of the fact that the Court had just received our briefs at the time of oral argument and because of the shortness of time, we feel, should afford Mr. Justice Jackson and the Court ample cause to reconsider the matter and give us a rehearing and a full opportunity to argue this very vital question, especially where the opinion is not decided by a majority of the Court, and the death penalty is involved.

In *Harris v. United States*, 331 U. S. 145, 91 L. Ed. 1399, in a footnote on page 1408, it is stated:

"While this case presents a situation not involved in the *Davis* case, or in *Zap v. United States*, 328 U. S. 624, 90 L. Ed. 1477, 66 S. Ct. 1277, so that the

V. (A)

THE COURT HAS ERRONEOUSLY RULED "WITHOUT ACTUALLY RESOLVING THE QUESTION" THAT THE INSTRUCTION TO THE JURY REGARDING TITLE 8, SECTION 801 BEING THE EXCLUSIVE WAS OF LOSING AMERICAN NATIONALITY, WAS A HARMLESS ERROR. THE "UNRESOLVED" QUESTION AND RESULTING ERROR INVOLVED THE VERY HEART OF THIS CASE AND WAS EXTREMELY HARMFUL. HAD THE JURY BEEN CORRECTLY INSTRUCTED ON THIS SUBJECT IT WOULD OR COULD HAVE ACQUITTED THE DEFENDANT. THE GRANTING OF CERTIORARI IN MANDOLI vs. ACHESON ON A POINT WHICH VITALLY AFFECTS US ALSO SHOULD CAUSE THE COURT TO GRANT US A REHEARING, ESPECIALLY WHERE THE SOLICITOR-GENERAL AND TWO COURTS IN TWO CIRCUITS ARE IN DISAGREEMENT, AND THE QUESTION IS STILL ACTUALLY UNRESOLVED. THIS COURT HAS ALWAYS BEEN WILLING TO RECONSIDER AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW WHERE IT HAS HERETOFORE

Court's conclusion cannot rest on those cases, it is appropriate to note that neither of those cases carries the authority of a majority of the Court. Aside from the fact that a constitutional adjudication of recent vintage and by a divided Court may always be reconsidered, I am loath to believe that these decisions by less than a majority of the Court are the last word on issues of such far-reaching importance to constitutional liberties."

NOT BEEN DECIDED BY A MAJORITY OF THE ENTIRE COURT AND HAS BEEN DETERMINED BY A DIVIDED COURT.

Where this court has left unresolved the important question of whether Section 801 of Title 8 is the exclusive way of losing one's nationality and where the court has granted certiorari in another case, to-wit, *Mandoli v. Acheson,* now pending before the court to resolve and determine that question, and where there is disagreement between the Solicitor-General and two courts in two different Circuits, and where the court was specifically instructed in our case in conflict with the instructions in another court, this Court should grant a rehearing so that we may have the benefit of this court's decision on the unresolved question and its effect on our case.

See:

Casey v. U. S., 96 L. Ed. 926-7; also our footnote 7, supra.

V. (B)

THE COURT HAS NOW OVERRULED THE MANDATE OF CONGRESS IN TITLE 8, SECTION 800, AND HAS DECIDED CONTRARY TO THE EXPRESS MANDATE OF CONGRESS REGARDING EXPATRIATION, WHICH DECLARES "THAT THE RIGHT OF EXPATRIATION IS A NATURAL AND INHERENT RIGHT OF ALL PEOPLE, INDISPENSABLE TO THE ENJOYMENT OF LIFE, LIBERTY AND THE PURSUIT OF HAPPINESS," AND FORBIDS "ANY DECLARATION, INSTRUCTION, OPINION, ORDER OR DECISION OF ANY OFFICER OF THE UNITED STATES WHICH DENIES, RESTRICTS, IMPAIRS OR QUESTIONS THE RIGHT OF EXPATRIATION."

Congress, since July 27th, 1868, has declared that any such declaration on opinion is inconsistent with the fundamental principles of the Government of the United States. (15 Stats. 223, 224, Title 8, Section 800, U. S. Codes.)

This decision arose out of a purportedly dual national German, who had taken on American citizenship. Germany also claimed that he was a citizen and sought to impose military duties and obligations upon him. Attorney General Black (Op. 89 HOR, 1859) pronounced the act as contrary to our American principles. Once a person elects his foreign nationality,

the original country from which he came cannot claim him nor impose rights or obligations upon him.

The opinion of the court in this case now holds that both countries have a claim upon him, and this regardless of whether one of the countries during the period of time alleged can give him no protection in exchange for his citizenship, nor do a thing for him or in his behalf. It cannot perform its part of the bargain in exchange for allegiance.

See *Luria v. United States,* 231 U. S. 9, 28;
Wallace v. Harmstad, 44 Pall. (8 Wright 492, 501).

And, contrary to the principle that while residing in enemy territory he is an enemy for all purposes.

LaMarrs Executor v. Brown, In re, 92 U. S. 187;
Johnson v. Eisentrager, 339 U. S. 768.

In *Johnson v. Eisentrager,* 339 U. S. 768, 94 L. Ed. at page 1263, this court said:

"With confirmation of recent history, we must reiterate this Court's earlier teaching that in war 'every individual of the one nation must acknowledge every individual of the other nation as his own enemy—because the enemy of his country' *The Rapid (US)* i. Cranch 155, 161, 3 L. Ed. 520, 522. See also *White v. Burley* (US) 20 How. 235, 249, 15 L. Ed. 886, 889; *Lamar v. Browne,* 92 US 187, 194, 23 L. Ed 650, 653. And this without re-

gard to his individual sentiments or disposition. *The Benito Estenger,* 176 US 568, 571, 44 L. Ed. 592, 593. The Alien enemy is bound by an allegiance which commits him to lose no opportunity to forward the cause of our enemy; hence the United States, assuming him to be faithful to his allegiance, regards him as part of the enemy resources. It therefore takes measures to disable him from commission of hostile acts imputed as his intention because they are a duty to his sovereign.

"The United States does not invoke this enemy allegiance only for its own interest, but respects it also when to the enemy's advantage. In World War I our conscription act did not subject the alien enemy to compulsory military service. [July 9, 1918] 40 Stat. 845, 885, ch. 143, ch. XII § 4. The Selective Service Act of [June 24] 1948, 62 Stat. 604, ch. 625, 50 USCA Appx. #454 (a), FCA title 50, Appx. 97 § 4, exempts aliens who have not formally declared their intention to become citizens from military service, training, service and registration, if they make application, but if so relieved, they are barred from becoming citizens. Thus the alien enemy status carries important immunities as well as disadvantages. The United States does not ask him to violate his allegiance or to commit treason toward his own country for the sake of ours. This also is the doctrine and the practice of other states comprising our Western Civilization."

But, the court, in *Kawakita v. United States,* has now reversed this wholesome doctrine. It declares that

a man in the enemy country who is a citizen of that country although therefore necessarily an alien enemy does not carry "important immunities as well as disadvantages." The United States now asks him to violate his allegiance to the nationality of the country where he is living for the sake of ours. This is contrary to the doctrine and the practice of other states comprising our Western Civilization.

Kawakita, as long as he did not enter his name in the Koseki was exempt from the military draft. Once having entered his name in the Koseki, he became subject to the draft and was, in fact, drafted in the particular job, service and work. He became a citizen of Japan, in fact, which carried with it an "alien enemy status to our own country", and secured the important immunities of Japan—free travel and other benefits as well as the disadvantage of having lost his United States citizenship.

The majority of the Court now says, however, we (like Germany did in 1859) can claim him as our citizen when it suits our purpose subsequent to the war. We respectfully submit that the court's decision rendered in our case reverses the doctrine of *Johnson v. Eisentrager* as well; that before this stands, a rehearing should be granted.

VI.

AN IMPORTANT QUESTION OF INTERNATIONAL LAW HAS BEEN IGNORED

The Court has ignored in its opinion and failed to discuss the rights and duties of petitioner as well as of the prisoners of war under the Geneva Convention of July 27, 1929 [47 Stat. 2021]. This is a question of International Law and not of local law.

Under our Treaty with Japan, the prisoners of war were required to obey the conquering power in whose power they were placed and to receive pay for it. It was their duty to obey and to work in accordance with the requirements of the camp. It was also their duty not to violate the laws of Japan, nor the rules or regulations of the camp.

We respectfully contend that it was even a part of our own law that these men should be required to obey and to carry out the particular duty or function to which they were assigned, and that their failure to do so was disobedience of our own law. The court has failed to consider our entire contention under the question of the Geneva Convention, and its effect upon the status of the petitioner and his occupation within those confines, which we discussed from page 47 *et seq* in our Opening Brief, pointing out in that setting the prisoners of war were bound by International Law and therefore none of the acts which were charged in this indictment could amount to "aid and comfort" within the constitutional definition.

The Treaty obligations between the United States and Japan were self-executing and are last in point of time.

Rosborough v. Rossell, 150 Fed. (2d) 809, 812, 813;

United States v. Reid, 73 Fed. (2d) 153.

In the setting of a prisoner of war camp, under such circumstances, there could be no aid and comfort to the enemy. If he committed any acts there, he was triable by a Military Commission or by a court established in Japan, where he would have had all of the witnesses and all of the evidence available speedily.

Johnson v. Eisentrager, 339 U.S. 763, 94 L. Ed. 1255.

The Court recently upheld a jurisdiction of a German court to try a woman for murder while residing in the Western Zone of Germany. The same types of occupation courts were in existence in Japan and if petitioner was guilty of Treason could have received a speedy trial there; however these were denied to him.

Madsen v. Kinsella, 96 L. Ed. (adv.) 592.

VII.

THIS COURT FAILS TO PASS ON THE QUESTION OF WHETHER VENUE WAS ESTABLISHED AT LOS ANGELES, CALIFORNIA.

This was one of the issues submitted to the jury. In view of the recent decision of this Court that occupation courts were properly established in Germany to try an American soldier's wife for murder in Germany, and such occupation courts existed in Japan and the petitioner herein repeatedly reported to the American Consul in Japan and also to the Eighth Army at least twenty times, there was no venue established to try the case at Los Angeles since he was not found at Los Angeles but was actually in Japan reporting to the American Government Officers and had a right to be tried there if he had committed the acts charged in the indictment.

We submit that the evidence fails to show any venue of finding as required in order to bring the case within the exception established by Congress for the place of trial.

VIII.

THE CHARACTER OF THE ACTS WAS SUCH AS SIMPLY NOT TO RISE TO THE DIGNITY OF TREASON.

As to whether the acts of making a man carry two buckets of paint, when he was only carrying one, and was supposed to carry two and kicking a man in order to compel him to work is Treason; or assisting in making a man run around a compound four to six times because of an alleged violation of local rules amounts to Treason, we respectfully submit that nowhere could one find in the definition of Treason heretofore that such acts constitute Treason.

The Court has said: "We cannot say as a matter of law that petitioner did these acts under compulsion." However, there is testimony in the record that if Kawakita did not obey the military authorities he would be severely dealt with, or even killed, which testimony stands undenied and uncontradicted. There is also ample testimony that in order to save the prisoners of war from the more severe punishments which the Japanese were inflicting, our own Americans were punishing the Americans. Thus Sergeant Montgomery admitted, although he was a counter-intelligence officer, he had personally hit three men. The English and the British set up a disciplinary court to punish the prisoners of war who were violating the laws or rules or regulations. This they said they did to avoid

the more severe punishments which the Japanese were or would inflict. (Page 112, Brief in the Court of Appeals Supplement—the diary of Dr. Bleich, R. 3399 to 3405; R. 227; R. 203; R. 237; R. 260; R. 318).[14]

For the purpose of contending that the acts were treasonable the government contended and the majority stated that this Company was not a company operating under the Government of Japan. The respondent is therefore on the horns of a dilemma. In either event no treason could be committed, for if this was a private company and the employment was for a private Company, and the acts were done against individuals working for the private Company, there can be no treason. If petitioner was working in a military area with the Company operating under the Government of Japan, the petitioner lost his citizenship under subdivision (d) of Section 801 of the U. S. Code and therefore could not be guilty of treason. The testimony is uncontradicted that the prisoners of war received pay from the Company.

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[14]Sgt. Montgomery testified:

"Q. Now, was it an offense as far as the Japanese rules or Japanese laws were concerned, for prisoners of war to take these vegetables without permission? A. Yes, we were forbidden to. Q. And if prisoners did take them without permission what was the punishment that was meted out to them? A. If they were caught in the act by the Japanese, why they were beaten; but if it (R. 238) was determined by means of investigation who they were, why, it was usually—they were usually given their punishment by—under the auspices of Major Beadnell, Dr. Bleich, Lieutenant Bryant, and the Board of Supervisors."

Sergeant Montgomery testified (R. 260) that "If the man persisted in eating what we called 'the dysentary dileons and onions' he was usually slapped around a little bit."

(R. 318): Q. Sergeant, I take it you are an American citizen, aren't you? A. Yes, sir. Q. And you have never been punished, have you, for slapping any Americans in the camp? A. No, sir.

The theory that these laborers might again go into combat duty if they asked is contrary to their requirements under International Law. If they were liberated upon an invasion what the Government might have done with these men after their years of confinement is problematical. (Incidentally the petitioner has now been confined in jail longer than any of the prisoners of war were confined after their capture.)

The law of treason does not concern itself with former soldiers who have become laborers, nor with an individual action. It concerns itself only with action for a foreign Government and against one's own. It is a crime against the national security, not as against individual men. It must be a "design for treason" and a treasonable project.

The Court now says that these acts constitute Acts of Treason because it says: "These acts in their setting *would* help (referring to six overt acts of alleged cruelty) make all the prisoners fearful, docile and subservient. Because of these punishments the prisoners would be less likely to be troublesome; they would need fewer guards; they would require less watching. These acts would tend to give the enemy the 'heart and courage to go on with the war.'"

The trouble with this suppositious statement is that it is based upon speculation and conjecture. The government did not prove that it did any of these things. After it produced several witnesses regarding the alleged acts, the defendant asked these prisoners of war if it had made any of them fearful, docile or subserv-

ient. They answered in the negative. In any event prisoners of war are *prisoners*, not soldiers. Under International Law they were prisoners in the power of their conquerors. It was their obligation to be "fearful, docile and subservient," like any other prisoners.

The speculative allegations of the indictment not only remain unproved by any witness in the case—they remain disproved. The prisoners continued to be troublesome, not only until the war ended but even after it ended. Fifteen went a.w.o.l. immediately after the announcement of the armistice and U. S. took over. The guards who manned the prisoner of war area constituted the regular number of guards assigned to the camp, and there is no testimony that there was ever any fewer guards because of anything that the petitioner did; nor was there any evidence that they required less watching. The contrary is established. The camp was manned by ex-war and partly disabled veteran guards (Ichiba and Akamatsu, Gavinyhand, and a few others who were named in the record, which we do not now have before us); he certainly did not give any of them "heart and courage to go on with the war."[15] They didn't participate any in the war. There

[15] We can see no comparison between the case of *Trial of Cal Vaughn*, 13 How. St. Tr. 485, and the instant case. Captain Vaughn's involved cruising in a small ship in English waters in the service of France, a foreign government, with intent to take the king and ships. How can the Government compare the act of adherence with the individual act of hitting a prisoner of war in a prisoner of war camp who was momentarily not working, or with making a man carry an extra bucket of paint 300 feet? In the Vaughn case the acts were designed "to take the king and ships" (Government's brief, p. 66)—"to confederate with, and strengthen the king's enemies." It was a project for a foreign government or with a design to aid a foreign government, which fact does not exist here, but which was an individual matter in an individual capacity. The Government says that petitioner's action would bolster the morale of the enemy and could very well

is no evidence of any other soldiers, except those assigned to the camp, were ever there nor even in the vicinity of it. Nor, is there any evidence that they went on with their work other than because they were assigned to it or it was a part of their job. Hence the assertions of the court stands unproved as a fact in this record.

Nor are any of these acts, even if they were deemed to have occurred, acts of any *treasonable project*, so carefully set out heretofore by Mr. Justice Douglas, in *Haupt v. United States*, 330 U. S. 631.

The only definition we could ever find of Treason heretofore required evidence of a *treasonable project* and aid and comfort of the enemy—such as giving them ships, shelter, sustenance or supplies, the exposure of military secrets where it involved artifice and cunning. The very word "betrayal" implies duplicity.

When this case first started that was the theory of the government. They said the mere working in a defense plant in a foreign country constituted treason,

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tend to give heart to the Japanese soldiers at the camp whose morale would be directly affected by seeing the treatment accorded Americans. This is in direct contradiction to the previous contention of the government that the petitioner acted without any orders from the Japanese So Hanchos or officers or guards, because they were not present. Hence, if they were not present the effect which the Government claims petitioner's conduct would have, could not take place. Furthermore, the Government's own witnesses established that the punishments at the prisoner of war camp were all started, directed, controlled, and stopped by Japanese Sergeants Ichiba and Akamatsu. Even if the petitioner joined in the participation of the punishments, which he has at all times denied, it could not give any added sense of superiority to the superiors who had started, directed, controlled, and stopped, the punishment. None of it was done to compel work, but to stop theft of articles to which other American prisoners of war were equally entitled to receive, if not stolen by their fellow prisoners. The argument is without merit.

Treason—insidious and dangerous treason—is the work of the shrewd and crafty more often than of the simple and impulsive.

and this indictment so alleged. When it was discovered long after the Grand Jury had been discharged that the defendant was drafted into his job and therefore this work could not constitute a *treasonable project*, the government's position shifted to a theory that the defendant made the men do more work than they were doing—but not more than was required. As a matter of fact, there is no evidence except the Toland incident covering a period of more than a year, that this even occurred. The testimony of the men is that they did not perform any more work, but tried to do as little as they, as prisoners of war, could do. (See Testimony of Sgt. Montgomery.)

Hence the case proceeded on a different theory than that alleged in the indictment. This the court has not answered in its opinion.

Nowhere could anyone find, prior to this trial, that any of the acts herein set out would constitute "Treason". They have been dealt with as possible war crimes, but not as Treason anywhere. If our definition of due process means that a statute must set out *with clarity* the things that constitute a violation of the law (see *Kraus Bros. & Co. v. United States*, 327 U. S. 614), then certainly no one could look to any place for a definition of any of the acts herein set out constituting treason. Not until this court defined them and said they were Treason could anybody determine as a matter of law or as a matter of fact that the acts would constitute Treason. Congress has warned the public to

look to the acts of Congress alone to discover what conduct is evasive and hence likely to create criminal liability.

United States v. Resnick, 299 U. S. 207, 81 L. Ed. 127;
M. Kraus & Bros. v. United States, 327 U. S. 622, 90 L. Ed. 899.

Could a Japanese-American attorney looking at our Constitution or Statutes say that working in this military area by a Niesii, doing the acts here alleged, would constitute Treason? Could anyone else so say, prior to the decision of this court? Where could one find or determine that these acts did in fact constitute Treason? California Statute, the Government Code, would tell him in Sec. 272 that removing his residence removed his allegiance; hence he would not be guilty of treason.

The jury was out nine days trying to determine whether he did commit treason and disagreed as to several of the acts of a more serious nature. A conviction ought not to rest on a statute that does not clearly define the acts constituting the offense.

Bollenbach v. United States, 326 U. S. 607;
United States v. Resnick, 299 U. S. 207, 81 L. Ed. 127;
M. Kraus & Bros. v. United States, 327 U. S. 622.

A jury in judging guilt cannot supply that which the law failed to do by express work or fair implication.

We respectfully submit that we should be permitted to reargue the case on the basis of the lack of definition of these acts anywhere to constitute Treason as a matter of law or of fact, prior to this decision. And, since the jury had trouble reaching its verdict and stayed out the longest of any jury we have any knowledge of in Federal history, we had a right to have the jury polled as to the names of the two witnesses whom each juror believed established the constitutional requirements. We asked that the jury be polled and the court declined to poll the jury. This was fundamental error which was not touched on by the Court of Appeals and we believe we are entitled to a rehearing on this question.

IX.

THERE ACTUALLY WAS A HUNG JURY

We also believe we are entitled to a hearing on the question of whether the verdict actually was a hung jury in view of the previous decision of this court in *Andres v. United States,* 333 U. S. 740, that the jury must return a unanimous verdict in the indictment, and the prosecutor could have withdrawn had he so chosen the overt acts undecided, but until he did so we were entitled to a unanimous verdict on the entire issues presented by the indictment. Otherwise, we had a hung jury.

Andres v. United States, 333 U. S. 740, 92 L. Ed. 1055;

American Publishing Co. v. Fisher, 166 U. S. 464, 41 L. Ed. 1079.

Mr. Justice Frankfurter has said in the *Andres* case:

> "Until the twelve jurors had agreed on every part of the verdict, they have not agreed on any verdict." Citing with approval 287 N. Y. 171, 38 N. E. 2d 482, 138 A. L. R. 1222.

X.

THIS COURT SHOULD CONSIDER THE QUESTION OF PUNISHMENT.

With reference to the punishment, the court in the *Andres* case, *supra,* said:

> "Whether a sentence may be so severe and the offense so trivial that an appellate court should set it aside is a question which we need not reach."

However, we feel that it is a part of the court's duty, not only under the mandate, to reverse, or affirm, or modify a judgment; but under its supervisory power over the Federal courts in a criminal matter.

McNabb v. U. S., 318 U. S. 332.

In a case just decided, to-wit, *United States v. Rosenberg* by the Second Circuit, 195 Fed. (2d) 583, 603, *et seq.,* that court discussed at length the duty of an appellate court of modifying a sentence or judgment and its right to do so. We think this is an important question that should be decided in this case also.

The camp commander Lt. Hazama and the Sgts. who ordered the punishments (Ichaba and Akamatsu), we understand, received fifteen years from the War Crimes Tribunal in connection with the operation and handling of this camp. Their convictions rested in part on some of the testimony of some of the witnesses in this case, who, at the time of making their statements for the War Crimes Tribunal, did not at any time men-

tion Kawakita in the statements. These statements as to each of the overt acts are in evidence, also there is some place in the record where the facts are brought out about Lt. Hazama and Sgts. Ichaba and Akamatsu, although the entire record is presently in Washington.

In respect to the conduct of Kawakita, we call attention of the court to the fact that the prisoner of war camp, as far as the prisoners of war were concerned, was headed by Prisoner of War, Captain Bleich. Not a single record was made by Captain Bleich of any wrongful act by Kawakita; not a single complaint was made to him, nor was he called as a government witness against the petitioner herein. The defense called him and had him on the stand for a few days as a defense witness. Furthermore, although there were forty-five American officer prisoners of war in the camp, not a single one was called by the government against the petitioner.

Although the good that men do is interred in their bones, nevertheless the record is uncontradicted that Kawakita tried to help the American prisoners of war from time to time, both before and during and after the war. (R. 4084; R. 3741, 4742). The record is uncontradicted that as an interpreter that he was bound to get the blame for orders or directions of those above him. Although he defended on the ground that he did not commit any of the acts charged, nevertheless, he is entitled to the presumption that if the acts did occur he was under the compulsion of those above him, and those giving him orders. Nothing in the record contradicts

this state of affairs. It was natural for the witnesses, who were prisoners of war, to transfer their hate from the men who directed the orders to the men who interpreted them. But, we again assert, that we do not find anywhere that these constituted a treasonable project within the constitutional definition.

XI

PETITIONER IS ENTITLED TO HAVE JUSTICE FRANKFURTER PARTICIPATE IN THE CASE.

One other point we believe, entitles us to have the case reheard. Unfortunately Mr. Justice Felix Frankfurter was ill at the time of the oral argument. We did not have the benefit of his participation in the case nor in the disposition of it, as a result thereof. Happily now, he has recovered his health and we feel that the court as well as the petitioner is entitled to have the benefit of his views and his discussions on the important questions of law. A case decided so closely on the issues here presented entitle us, we respectfully submit, to the benefit of all the best brains of the members of the court who were eligible to participate, and that a rehearing should be granted with all the eight members of the Court participating, so that we may fully and fairly argue before the entire court each and all of the matters presented.

CONCLUSION

In an appendix herewith, we append a comparison of the cases of *Savorgnan v. United States*, *Mackenzie v. Hare* and *Kawakita v. United States*.

Prisoners of war are a problem to any nation. The decision in this case, if allowed to stand, may be very hazardous to our own subjects with dual nationality hazardous to our own and our Allies' subjects with dual nationality and to our own prisoners of war. Since the decision was closely divided and not by a majority of the entire court. It should be reheard fully and the judgment below reversed.

WHEREFORE, petitioner prays for rehearing on each and all of the grounds herein set forth which are based upon errors or mistakes of law and fact occurring in the decision of this court, and if a rehearing is granted, to be permitted to argue the entire case fully and amply before the whole court.

Respectfully submitted,

MORRIS LAVINE
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FRED OKRAND,
Attorneys for Petitioner

CERTIFICATE OF COUNSEL

MORRIS LAVINE, counsel for the above petitioner hereby certifies that the foregoing petition for rehearing is taken in good faith and not for the purpose of delay.

MORRIS LAVINE
Counsel for Petitioner.

Appendix

Case of:
Rosette Sorge Savorgnan v. The United States of America, 338 U. S. 491.

Mrs. Savorgnan was born May 2, 1915 in Reedsburg, Wisconsin. At the age of 9 she moved with her parents to LaCrosse, Wisconsin, where her father still lives and she claims as her place of permanent residence. She resided continuously in the United States until About July 15, 1941. She is a U. S. college graduate.

Mrs. Savorgnan met her husband, Allessandro Savorgnan, then Italian viceconsul at St. Louis, Missouri, in the latter part of 1939 or

Case of:
Tomoya Kawakita vs. The United States of America, No. 570 October Term, 1951.

Tomoya Kawakita was born September 26, 1921, at Calexico, California. He resided continuously in the United States for 17 years. He is a Japanese college graduate (Meiji University, Japan.)

Tomoya Kawakita went to Japan in 1939 to see his aged grandfather. He was registered in Japan as an American alien. His name was not

Case of:
Mackenzie vs. Hare, 239 U. S. 299.

Mrs. Gordon Mackenzie was born in the State of California and ever since has resided in the State of California. On August 14, 1909, she was a resident and citizen of the State of California and of the United States.

On August 14, 1909 she was lawfully married to Gordon Mackenzie, a native and subject of the Kingdom of Great Britain. He had re-

in 1940. He informed her that under Italian law she would have to become an Italian citizen before he could obtain royal consent to their marriage, such consent being required in the case of persons in the Italian consular service.

Mrs. Savorgnan, on March 28, 1940 signed an application for Italian citizenship. There was no formality about it. She was not required to raise her hand and the document she signed was all in Italian, which she did not understand.

entered on the family Koseki. In 1943 a policeman stopped him on the street to learn why he was not in the Japanese army and told him he would have to elect which one he wanted to be. Kawakita asked him how he could choose to become a Japanese citizen, and the policeman told him that he could do so by entering his name in the family Koseki.

Kawakita went with his uncle to the City Hall at Suzuki City and applied to have his name entered in the family register or Koseki. The registrar asked him if this was his wish and he said it was and after his name was entered he (Kawakita)

sided in California prior to that time, still resides in California, and it is his intention to make this State his permanent residence. He has not become a naturalized citizen of the United States. Ever since their marriage, Mrs. Mackenzie and her husband have lived together as husband and wife in the United States.

On January 22, 1913, she applied to the defendant, the Board of Election Commissioners of the City and County of San Francisco to be registered as a voter. Registration was refused to her on the ground that by reason of her marriage to Gor-

Mrs. Savorgnan appeared at the Italian consulate in Chicago and signed an oath renouncing her American citizenship and swearing allegiance to the King of Italy. It was all in Italian and she said she didn't understand it. Her husband was advised by a lawyer friend that in his opinion any steps which she might take in order to acquire Italian citizenship would not affect her status as an American citizen.

put his seal upon it, and thus formally elected Japanese nationality.

Kawakita was advised by the Japanese police in charge of naturalization that if he entered his name in the family register, he would be considered a Japanese subject thenceforth. He would not be treated as an alien and he would have all the rights and privileges of a Japanese citizen. He also changed his residence address to Japanese residence. Kawakita went to the police station which handled naturalization affairs and upon the presentation of his Kos-

don Mackenzie, a subject of Great Britain, she thereby took the nationality of her husband and ceased to be a citizen of the United States.

There was never at any time any intention on the part of Mrs. Mackenzie to lose or abandon her American citizenship. Her voluntary *act* of marriage terminated her American citizenship.

The Court held that the Doctrine of Perpetual Allegiance maintained by England was not the law of this country and "that the prevalent doctrine of this country always has been that a citizen had a right to expatriate himself." The Court

		eki, the officer removed his name from the alien register, making an entry on the card that Kawakita's "citizenship" was "restored March 8, 1943." This was contemporaneous construction by that government of Kawakita's voluntary act.		further held that this is a legislative declaration, citing C. 249 15 Stat. 223. The Court held that her act constituted a renunciation of citizenship, and that it was *tantamount* to expatriation. "Its consequence must be considered as elected."	
Holding:	Expatriation is a question of Law. Intention is immaterial.	Holding:	Expatriation is a question of fact. Intention is material.	Holding:	Expatriation is a question of law. Intention is immaterial.